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January 12, 2000
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Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, N.W.
Washington, D.C. 20554

RE: Cable Services Bureau Docket No. 99-~~[illegible]~~ 363

Dear Ms. Salas:

Enclosed please find an original and four copies of the Comments of the National Association of Broadcasters;

We are separately providing a diskette containing the Comments, labelled in the manner described in ¶ 34 of the NPRM, to Steven Broeckaert.

I would be grateful if you could file-stamp the enclosed extra copy of the comments and return it to our messenger.

Many thanks for your attention.

Very truly yours,

Tom Olson

Thomas P. Olson

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

RECEIVED
JAN 12 2000
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:	)	
	)	
Implementation of the Satellite Home Viewer Improvement Act of 1999	)	**CS Docket No. 99-363**
	)	
	)	
Retransmission Consent Issues	)	

COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

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January 12, 2000 **Counsel**

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EXECUTIVE SUMMARY

The Commission's task in this proceeding is to implement the congressional directive in the Satellite Home Viewer Improvement Act ("SHVIA") to adopt regulations governing "good faith" negotiations between TV stations and multichannel video programming distributors (MVPD's) about retransmission consent. The challenge for the Commission is to implement that directive in a way that is consistent with the statute, that will not inhibit robust, arms-length marketplace negotiations, and that will not lead to a large number of complex and costly proceedings that will embroil the Commission in the minutiae of those negotiations.

Fortunately, the context in which retransmission consent negotiations arises makes the Commission's task much easier. The reason is simple: *stations have strong incentives to be carried by MVPDs in the station's local markets.* The Commission recognized as much in adopting its original retransmission consent regulations in 1993, when it pointed out that "[l]ocal broadcast stations are an important part of the service that cable operators offer and broadcasters rely on cable as a means to distribute their signals. Thus, we believe that there are incentives for both parties to come to mutually-beneficial arrangements."[1] Indeed, it is because stations want to be carried by their local MVPDs that they have fought so hard to have Congress impose must-carry obligations on cable systems and -- as part of the SHVIA itself -- now on satellite carriers.

The incentive for stations to be carried is that they make money by selling commercial time to advertisers and their revenues depend on the number of viewers they reach. Since

---

1 *In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 9 FCC Rcd. 6723 ¶ 115 (Sept. 28, 1994).

MVPDs offer a convenient way for viewers to receive their local stations along with nonbroadcast channels, stations naturally desire to have their signals included among the MVPD's offerings.

There is therefore no reason to suspect that a station will *not* want to enter into good faith negotiations for retransmission consent with an MVPD, and no reason to anticipate that a failed retransmission consent negotiation is the product of a lack of a good faith desire to make a deal, as opposed to the normal differences of opinion that arise in commercial transactions. That critical point completely distinguishes this proceeding from the Commission's actions under Sections 251 and 252 of the Communications Act. In those provisions, Congress did something radically different from what it has now done in the SHVIA: it forced local phone companies ("incumbent local exchange carriers," or "ILEC's") to *make deals that are contrary to their own interests and that the ILEC's do not want to make.* The Commission's extraordinarily detailed and aggressive regulation under Section 251 can only be understood as a response to the suspicion that ILEC's would find some way to duck the statutory requirement that they enter into deals that are anathema to their own business interests.

Just as retransmission deals are attractive to stations, they are also attractive (at least for certain stations) to MVPDs. For example, the two major DBS firms have told both Congress and the public that the ability to offer local stations is extraordinarily valuable to their businesses because it makes their overall service much more attractive to consumers. Moreover, the DBS companies are charging their customers at least $1.20 per month for each local station. Because TV stations add so much value to MVPDs, it is natural, in a retransmission consent negotiation, for a station to ask an MVPD to share some of that value with the station.

As the Commission points out, one of the goals of the SHVIA was to foster satellite as a competitor to cable. But just as Congress did not abolish the "unserved household" limitation even though doing so might have helped the satellite industry in the short run, Congress also did not abolish stations' right of retransmission consent vis-à-vis satellite carriers. Instead, after a six-month grace period, the statutory retransmission consent right applies with full force to satellite carriers -- and is enforceable regardless of any disputes about the "good faith" issue. Nor did Congress order stations to grant retransmission consent to satellite carriers on the same terms and conditions on which they may have granted consent to other MVPDs. Congress knows how to order companies to offer new parties existing deals -- having done so in Section 251 and 252 of the Communications Act -- but consciously chose not to do so here.

Instead, Congress simply adopted a obligation to negotiate in good faith, and specifically provided that offering different prices and other terms was perfectly consistent with good faith if based on competitive marketplace considerations. Under settled law, an obligation to negotiate in good faith does not require a party actually to make a deal or even to make any concessions. (Again, Sections 251 and 252 are very different, because Congress *did* there require parties to enter into involuntary agreements.) And there are innumerable "competitive marketplace considerations" that may result in different deals being reached with different parties, including (to mention just a few) (1) the presence of multiple MVPDs in some markets now, as opposed to a single MVPD (the local cable system) in the early 1990s, (2) the fact that a particular MVPD is violating the station's copyright by continuing illegally to deliver distant affiliate signals in the station's market, a practice the station wants stopped as part of the deal, and (3) the fact that an MVPD has announced that local stations are exceptionally valuable to it (and hence should be willing to offer substantial consideration to carry them).

In the context of "forced march" negotiations in which one party is participating against its will, the Commission and the NLRB have sometimes adopted relatively intrusive regulations about the parties' "good faith." *Those precedents make no sense here*, because, as the Commission has previously found, stations have a strong interest in entering into retransmission agreements with MVPDs, and there is no reason to doubt that stations will try to make those deals. Indeed, almost all network affiliates have long since made retransmission consent deals with cable systems, and many network stations made retransmission deals with a satellite carrier within days after the enactment of the SHVIA.

Because there is so little reason to doubt that stations will indeed seek to make retransmission deals with MVPD's, the Commission need not and should not establish a costly, burdensome, and intrusive system for evaluating the minute details of every retransmission consent negotiation. Rather, the Commission should establish and enforce a few objective rules relating solely to the negotiation process, and should avoid the enormously time-consuming task of evaluating "all the circumstances" to determine whether a station has negotiated in good faith. Finally, as the relevant precedents make clear, if the Commission were to find that a station had failed to negotiate in good faith, the remedy is simply to order more negotiations, and *not* to force particular terms and conditions on an unwilling party.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of:	)	
	)	
Implementation of the Satellite Home Viewer Improvement Act of 1999	)	**CS Docket No. 99-363**
	)	
	)	
Retransmission Consent Issues	)	

COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters ("NAB")[2] hereby submits its comments in response to Part IV of the Commission's Notice of Proposed Rulemaking ("NPRM") in the above-captioned matter.

[2] NAB is a nonprofit incorporated association that serves and represents America's radio and television broadcast stations and networks.

I. To Avoid a Regulatory Morass, the Commission Should Proceed Sparingly in Implementing The Good Faith Provisions of the SHVIA

In the SHVIA, Congress has directed the Commission to adopt regulations concerning "good faith" negotiations with multichannel video programming distributors ("MVPDs") about retransmission consent. If the Commission is not judicious in carrying out this regulatory exercise, it will create an administrative nightmare, taking on the task of adjudicating the minutiae of hundreds, if not thousands, of retransmission consent negotiations. And in each such exercise, the Commission will be called on to do what courts have found to be essentially impossible: deciding when a party in a normal commercial negotiation -- despite strong business reasons to want to make a deal -- has failed to bargain in good faith.

While, the law sometimes imposes an obligation of good faith in *implementing* a contract once an agreement has been reached,[3] courts and commentators have uniformly recognized the extraordinary – indeed, usually insuperable -- difficulty of implementing an obligation to *negotiate* in good faith. Both the Uniform Commercial Code and the Restatement of Contracts, for example, specifically exclude the contract negotiation stage when discussing the duty of good faith, generally due to the desire not to discourage negotiations from taking place at all.[4]

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[3] *See, e.g.*, *Candid Productions, Inc. v. International Skating Union*, 530 F. Supp. 1330, 1334-35 (S.D.N.Y. 1982) (Weinfeld, J.) ("Where the parties are under a duty to perform that is definite and certain the courts will enforce a duty of good faith, including good faith negotiation, in order that a party not escape from the obligation he has contracted to perform.").

[4] *See* UCC § 1-203 (1995); Restatement (Second) of Contracts § 205 cmt. c (1981); *Concord Boat Corp. v. Brunswick Corp.*, No. LR_C-95-781, 1998 U.S. Dist. LEXIS 14565 (E.D. Ark. April 7, 1998); *Racine & Larmie, Ltd. v. California Dep't of Parks and Recreation*, 14 Cal. Rptr. 2d 335, 339 (Cal. Ct. App. 1992) ("[A]n obligation implied in law to negotiate in good faith . . . has never been accepted in Anglo-American jurisprudence.").

A 1982 decision by the eminent jurist Edward Weinfeld of the Southern District of New York brilliantly summarizes the problem that is created by judicial (or administrative) efforts to administer a duty of good faith in the conduct of pre-agreement negotiations:

> "An agreement to negotiate in good faith is amorphous and nebulous, since it implicates so many factors that are themselves indefinite and uncertain that the intent of the parties can only be fathomed by conjecture and surmise. . . .
>
> Suppose [one party], in its initial request, asks for an amount for the licensing rights which [other party] considers exorbitant or outrageous and in its view has been advanced solely for the purpose of defeating the [obligation] to negotiate. On what basis does the Court decide that the sum is so unreasonable so that it can determine that the proposal was contrary to good faith bargaining? . . . .
>
> Finally, by what objective criteria is it determined on a motion to cite [a party] for contempt for an alleged violation of the decree that [the party's] negotiations were not in good faith but that it simply went through the appearance of negotiations in an effort to satisfy the terms of the injunction? With so many elements of an undefined nature open to negotiation, the [claimed obligation to negotiate in good faith is] unenforceable."

Candid Productions, Inc. v. International Skating Union, 530 F. Supp. at 1337 (S.D.N.Y. 1982) (footnotes omitted).[5]

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[5] *See* Necchi *S.p.A. v. Necchi Sewing Machine Sales Corp.*, 348 F.2d 693, 698 (2d Cir. 1965) ("[T]here is no way that anyone could forsee what would have come from examining the possibility of executing a new contract, even if this were done in the utmost good faith."); *Red Sail Easter Ltd. Partners v. Radio City Music Hall Productions, Inc.*, Civ. A. No. 12036, 1992 WL 251380 at *7 (Del. Ch. Oct. 6, 1992) ("Even were negotiations started in utter good faith, one cannot know where they would lead; whether a deal would be reached or an impasse encountered and if a deal would have been reached on what terms."); *VS & A Communications Partners v. Palmer Broadcasting Ltd. Partnership*, Civ. A. No. 12521, 1992

Given the problems inherent in monitoring and evaluating the nebulous concept of "good faith," the Commission could easily create a regulatory swamp by trying to impose a code of conduct on routine marketplace negotiations – much less to open up every such negotiation to a complex "all the facts and circumstances" analysis. There are hundreds of TV stations in the United States, each of which may be called upon before January 1, 2006 to negotiate retransmission consent agreements with local cable systems (sometimes with scores of such systems), with satellite carriers such as DirecTV and EchoStar, and with other MVPDs such as wireless cable systems. If the Commission adopts an intrusive regulatory regime about "good faith," each of these negotiations could become the subject of a complex, costly, and time-consuming adjudication. The Commission also needs to be concerned that some MVPDs will use frivolous accusations of supposed violations as a tactical weapon to harass local stations.[6]

II. A Duty to Negotiate In Good Faith Does Not Restrict a A Party's Negotiating Positions or Require Making Any Concessions

When Congress first made retransmission consent applicable to MVPDs in 1992, it stated its intention to "establish a marketplace for the disposition of the rights to retransmit broadcast signals," *without "dictat[ing] the outcome of the ensuing marketplace negotiations." In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd. 2965, ¶ 178 (1993) (quoting Senate Report on 1992 Cable Act) (emphasis added).

WL 339377, at *9 (Del. Ch. Nov. 16, 1992) (courts have held that "an absolute precondition" to enforcement of an obligation to negotiate in good faith is "the existence of a binding agreement between the parties as to all of the essential terms of the contract").

6 For an example of such an accusation in a related context, *see In Re EchoStar Communications Corp.*, CSR-5364-P, DA 99-1148, 1999 WL 381800 (F.C.C. June 10, 1999) (satellite carrier sought to force a programming vendor to continue to provide it with

This declaration is fully consistent with the hornbook principle that even when the law imposes a duty to negotiate in good faith, it does not require parties to do anything contrary to their own self-interest or make any particular concessions. *See Digital Equip. Corp. v. Uniq Digital Techs., Inc..*, 73 F.3d 756, 759 (7th Cir. 1996) ("Some parts of the law create discrete duties to do things in good faith; labor law, for example, creates a duty of good faith bargaining, but even that branch of law does not require either side to make concessions"). As the Seventh Circuit has explained in another case:

> "In a business transaction both sides presumably try to get the best of the deal. That is the essence of bargaining and the free market. . . . *So one cannot characterize self-interest as bad faith. No particular demand in negotiations could be termed dishonest, even if it seemed outrageous to the other party.* The proper recourse is to walk away from the bargaining table, not to sue for 'bad faith' in negotiations."
>
> *Feldman v. Allegheny Int'l Inc.*, 850 F.2d 1217, 1223 (7th Cir. 1988) (emphasis added).

Nor does a duty to negotiate in good faith require a party to enter into an agreement with the other party if the first party is not satisfied with the terms proposed. As Judge Weinfeld explained in *Candid Productions*, "[a] commitment to good faith negotiations does not carry with it a surrender of one's right to decide not to enter into another contract with a party." 530 F. Supp. at 1337.

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programming *even though the vendor had been forced to sue the carrier for violating the terms of its program contract*).

Even under the much more rigorous good faith bargaining requirements adopted by the NLRB, the obligation to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession." National Labor Relations Act § 8(d), 29 U.S.C. § 158(d). In the seminal Supreme Court decision about the duty of employers to negotiate in good faith, Justice Black emphasized that no duty to negotiate in good faith could alter the right of parties to act in their own self-interest and insist on terms that they considered acceptable. *See H. K. Porter Co. v. NLRB*, 397 U.S. 99, 103 (1970) ("either party shall be free to decide whether proposals made to it are satisfactory").

III. The Nature of Retransmission Consent Negotiations Makes Intrusive Regulation Inappropriate and Unnecessary

The Commission's NPRM mentions two existing regulatory regimes – the NLRB's implementation of the duty imposed by the Taft-Hartley Act to bargain in good faith, and the Commission's regulations implementing Section 251(c)(1) of the Communications Act – as possible models for a regulatory regime here. **Both of these regimes are based on a fundamental premise that is completely inapplicable here: that one party may not want to be at the bargaining table at all because it lacks any self-interested reason to try to make a deal.** Here, by contrast, both stations and MVPDs (at least with respect to certain network affiliates) have strong reasons of pure self-interest for making retransmission deals, and there is no need for the type of intrusive regulatory intervention embodied in the NLRB's regime and the Commission's regulations implementing Section 251(c)(1).

A. **Both the Commission's and the NLRB's Regulations About "Good Faith" Are Premised on the Lack of *Natural* Incentives to Negotiate**

In its First Report and Order on Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, the Commission put its finger on the "shotgun wedding" character of negotiations between incumbent local exchange carriers ("ILEC's") and new entrants: "Generally, *the new entrant has little to offer the incumbent. Thus, an incumbent is likely to have scant, if any, economic incentive to reach agreement.*" First Report & Order, 11 F.C.C. Rcd. 15499, ¶ 141 (emphasis added). In effect, Congress (and the Commission) were forcing ILEC's to swallow bitter medicine: "to provide interconnection to competitors that seek to *reduce the [ILEC's] subscribership and to weaken the [ILEC's] dominant position in the market.*" *Id.* (emphasis added). There is no doubt that incumbent phone companies have little inherent reason to make deals with parties that seek, through those very deals, to harm the phone companies.[7]

Indeed, as the Commission has observed in its NPRM here, the "good faith" obligation that the Commission imposed on incumbent phone companies related to *a specific statutory obligation to enter into specific transactions*: the "provi[sion] [of] interconnection to competitors." *Id.*; *see* NPRM, ¶ 18 n.40. In particular, the Act *requires* local exchange carriers to offer new entrants the same interconnection deals they have made with any other party. *See*

[7] *See also* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, FCC 96-325, First Report and Order, 11 F.C.C. Rcd. 15499, at ¶ 15 (1996) ("As distinct from bilateral commercial negotiation, the new entrant comes to the table *with little or nothing the incumbent LEC needs or wants.*") (emphasis added); Thomas B. Romer, Comment, *"Negotiate in Good Faith as to What?": An Analysis of the Good Faith Negotiation Clause of the Telecommunications Act of 1996*, 69 U. Colo. L. Rev. 257, 258 (1998) (mandating negotiation in good faith necessary because of "*lack of incentive* for a local monopoly to negotiate such an [interconnection] agreement") (emphasis added).

47 U.S.C. § 252(i). Crucially, in the context of retransmission consent, there is no obligation whatsoever on the part of stations to enter into transactions against their will.

Similarly, in the labor context, employers will frequently lack any inherent incentive to wish to bargain with unions -- as opposed to going over the union's head to deal directly with workers, or refusing to deal with the union at all in the hope that it will wither away. Like incumbent phone companies dealing with new entrants that seek to take away business from the incumbent, many employers view dealing with unions as a forced march they would prefer to avoid.

The highly interventionist approach adopted by the Commission with regard to incumbent LECs and (to a lesser extent) by the NLRB with regard to company-union negotiations are explainable only against this background, and makes no sense when transplanted to the context of retransmission consent negotiations.

B. By Contrast, Both TV Stations and MVPDs Have Strong Business Reasons To Enter into Retransmission Agreements

Broadcast TV stations earn the vast majority of their revenues by selling commercial time to advertisers. The amount that stations can charge for commercial time depends crucially on the size of the audiences that the stations can deliver. MVPDs – whether cable systems, satellite carriers, or otherwise – will play an important role in delivery of stations to local audiences. For those reasons, stations have strong, natural economic incentives to reach retransmission agreements with MVPDs.

For their part, MVPDs likewise have powerful business reasons to enter into retransmission agreements with at least some local stations.[8] In testimony last year, for example, EchoStar told Congress that "[s]tudies [show] that the lack of local channels on DBS is the single greatest obstacle for consumers when they are choosing DBS over cable or switching to DBS from cable."[9] According to EchoStar, "[m]ost of the consumers walking out of the store without a satellite dish cite the unavailability of local signals (which they can receive from cable) as the reason."[10] And now that local-to-local service has been authorized by statute, satellite carriers are confirming the great benefits they enjoy by being able to deliver local TV stations. For example, just last week DirecTV President Eddy Hartenstein "attributed DirecTV's Dec[ember] sales boost directly to new availability of local stations in specific markets, saying [that] strong numbers continued in first week of Jan[uary] with 'aggressive rollout of local channels in those markets.'" Communications Daily, Jan. 7, 2000. Another spokesman for DirecTV said that local-into-local "definitely had an impact" on DirecTV's strong December sales. *Id.*

Satellite companies not only use local stations to increase the attractiveness of their overall product, but also sell the stations to viewers at substantial prices. In Washington,

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8 Unfortunately, it appears that, as with cable, satellite carriers' primary business incentive is to seek retransmission consent only as to some of the major network affiliates in certain markets, while ignoring affiliates of emerging network and independent stations. For that reason, there is a need for the package-license approach that Congress adopted in the SHVIA as to satellite carriers, which encourages carriage of all the stations licensed to a particular market. *See* SHVIA Conference Report, 145 Cong. Rec. H11769, H11795 (daily ed. Nov. 9, 1999) ("The Conference Committee is concerned that, absent must-carry obligations, satellite carriers would carry the major network affiliates and few other signals.").

9 Testimony of David Moskowitz, General Counsel, EchoStar Corporation, before the House Commerce Committee Subcommittee on Telecommunications, Trade & Consumer Protection, Hearing on Reauthorization of the Satellite Home Viewer Act (Feb. 24, 1999).

10 *Id.*

D.C., for example, DirecTV charges $5.99 for a total of five broadcast channels, four of which are the local outlets for the four major networks (ABC, CBS, Fox, and NBC). While charging $1.20 per station per month, DirecTV pays no copyright fees whatsoever, thanks to the royalty-free license contained in Section 122 of the Copyright Act. Similarly, EchoStar charges $4.99 for the four major network outlets in Washington, or $1.25 per station per month.

The per-channel fees that DirecTV and EchoStar charge for local stations are far higher than they charge for most other channels. For example, EchoStar offers a package of some 65 TV channels for $28.99 per month, or less than 45 cents per channel – only slightly more than one-third of the price it charges for local channels.[11] Similarly, DirecTV offers a package of 64 TV channels for $29.99 per month, or less than 47 cents per channel – again, only a bit more than one-third of the price DirecTV charges to receive a local TV channel.[12]

Thus, unlike in the case of incumbent local phone companies – which must be coerced to make deals with new rivals – or the case of companies reluctant to deal with unions, both local TV stations and MVPDs have strong inherent reasons to work to make retransmission

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[11] EchoStar Web site, <www.dishnetwork.com/programming/quickbak.htm> (visited January 9, 2000).

[12] DirecTV Web site, <www.directv.com/programming/programmingpages/0,1093,122,00.html> (visited January 11, 2000).

Satellite carriers, of course, must pay for uplinking local stations to a satellite, and must spread those costs only among local viewers rather than among viewers nationally. Because detailed cost information is confidential to the satellite carrier, only the carrier knows how much net profit it is making on each local-to-local subscriber. Although that information might be very interesting to a station bargaining with a satellite carrier over retransmission consent, stations are not entitled to demand it, nor are satellite carriers entitled to demand confidential information from stations in the bargaining process. *See* Section VI(B) below.

agreements. The Commission observed as much in the original retransmission consent proceeding when it stated: "Local broadcast stations are an important part of the service that cable operators offer and broadcasters rely on cable as a means to distribute their signals. Thus, we believe that there are incentives for both parties to come to mutually-beneficial arrangements."[13]

The fact that such incentives exist is confirmed by the fact that many network affiliates have long since entered into retransmission consent agreements with cable systems. And many network affiliates have *already* entered into retransmission consent agreements with a satellite carrier, even though local-to-local retransmissions have been lawful for less than two months. Within days after enactment of the Satellite Home Viewer Improvement Act, DirecTV announced that it had entered into retransmission consent deals with the owned-and-operated stations of three of the four major broadcast networks.[14] EchoStar has similarly announced that it has entered into retransmission consent deals with the Fox network's owned-and-operated stations.[15] As a result, it would be wholly inappropriate, unnecessary, and unworkable to impose "shotgun wedding"-style constraints on a natural marketplace bargaining process that is already functioning on its own.

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13 *In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 9 FCC Rcd. 6723 ¶ 115 (Sept. 28, 1994).

14 "DIRECTV Reaches Agreement with NBC for Retransmission of Network-Owned Stations," <www.directv.com/press/pressdel/0,1112,252,00.html> (visited Jan. 9, 2000).

15 EchoStar Communications Corporation, SEC Form 10-Q (filed Nov. 2, 1999) <http://www.corporate-ir.net/ireye/ir_site.zhtml?ticker=dish&script=800&layout=4>.

IV. Congress Deliberately Rejected a More Intrusive Regulatory Regime

Before deciding to impose the largely hortatory "good faith" requirement, Congress considered – and rejected – imposing a more aggressive regulatory regime similar to the program access rules applicable to vertically integrated program suppliers. *See* 145 Cong. Rec. H2312 (daily ed. April 27, 1999) (House passage of statutory language imposing "nondiscrimination" rules on negotiations about retransmission consent). The Senate bill contained no similar requirement of any kind.

As a compromise, the conferees agreed to adopt the "good faith" language of section 325(b)(3)(C)(iii), which emphatically does *not* impose any "nondiscrimination" obligation on local stations; to the contrary, the SHVIA as passed expressly authorizes stations to enter into deals with different terms and conditions with different MVPDs. The satellite industry candidly recognized that the language Congress had adopted did *not* impose any nondiscrimination or other "fairness" requirement on broadcasters. *See* EchoStar Press Release, "Satellite TV Bill Fails to Protect Consumers" ("*The bill provides no language for broadcasters to deal fairly with satellite provider*s in negotiating the rights or fees to retransmit their signals.") (emphasis added); Satellite Broadcasting & Cable Association press release, "Draft Satellite TV Legislation Offers Consumers Little Relief, Fails To Provide Competition To Cable" ("*language that might prevent price and carriage discrimination by networks in negotiations with satellite carriers has been so weakened* that local-into-local service via satellite is in jeopardy") (emphasis added).[16]

[16] *See* <http://www.dishnetwork.com/profile/press/press/press258.htm> (Nov. 8, 1999) (EchoStar press release), <http://www.sbca.org/press/Nov01-99.htm> (Nov. 1, 1999) (SBCA press release).

Congress thus left in place the fundamental structure of Section 325(b), which – as the Committee Report on the 1992 Cable Act made clear, "establish[es] a marketplace for the disposition of the rights to retransmit broadcast signals," without "dictat[ing] the outcome of the ensuing marketplace negotiations." *In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd. 2965, ¶ 178 (1993) (quoting Senate Report on 1992 Cable Act).

Given Congress' explicit decision to reject the more highly regulatory approach taken by the House, along with its decision not to order stations to offer the same terms and conditions they have offered to other MVPDs, the Commission is without power to implement a more highly regulatory approach through the back door by interpreting a simple "good faith" obligation to mean more than it does.

V. Congress' Desire for a Competitive Marketplace Counsels In Favor of Only Limited Regulatory Interference with Free Market Negotiations

The emergence of satellite carriers as significant MVPDs has greatly changed the nature of the marketplace for granting of retransmission consent rights. In the early 1990s, when retransmission consent first became effective as against MVPDs, cable systems were typically the *only* distributors seeking to acquire such consent, giving those systems monopsony power over broadcasters. Broadcasters therefore had to endure the tremendous disadvantages that exist in marketplace negotiations when only a single buyer is prepared to bid for one's product. Today, by contrast, the existence of multiple MVPDs in at least some markets creates a more competitive marketplace for the sale of retransmission rights, and one that provides more opportunity for stations seeking to obtain compensation for granting these valuable rights. Given the generally minimal consideration received by stations from cable systems when cable was a monopsonist, it would be grossly unfair now to place shackles on broadcasters that would prevent them from recovering fair compensation for their rights when there is finally competition in the MVPD marketplace in at least some markets.

There is nothing in the SHVIA to suggest that Congress intended to eliminate the normal ebb and flow of this competitive marketplace. Moreover, Congress specifically provided that "it shall not be a failure to negotiate in good faith if the television broadcast station enters into retransmission consent agreements containing different terms and conditions, including price terms, with different multichannel video programming distributors if such different terms and conditions are based on competitive marketplace considerations." 47 U.S.C. § 325(b)(3)(C)(ii). The existence of multiple buyers is obviously a very important "competitive marketplace consideration" in this market, as in any market.

If Congress had intended to significantly change the playing field — and grant satellite companies automatic access to local stations -- it could have simply eliminated retransmission consent rules altogether for satellite carriers. But Congress did not do so, choosing instead only to give satellite carriers a six-month grace period and thereafter to require ironclad compliance by satellite carriers with the retransmission consent provisions. *See* 47 U.S.C. § 325(b)(2)(E), § 325(e).

Notably, Congress decided *not* to make alleged lack of good faith a defense to a claim of violation of retransmission consent, *see* 47 U.S.C. § 325(e)(4) ("exclusive defenses" do not include alleged lack of good faith). Congress plainly viewed compliance by satellite carriers with the retransmission consent regime as more important than enforcement of the precatory "good faith" obligation -- and refused to allow use of the "good faith" issue as an excuse for violations of the absolute duty not to carry stations without their consent. *See* Conference Report, 145 Cong. Rec. at 11796 (daily ed. Nov. 9, 1999) (procedures for enforcement of retransmission consent against satellite carriers, which do not permit raising "good faith" defense, "will ensure that retransmission consent will be respected by all parties and promote a smoothly functioning marketplace").

VI. The Commission Should Adopt Minimal Objective Rules Designed to Ensure that Stations Engage in Discussions with MVPDs

Given the powerful *inherent* mutual incentives for stations and MVPDs to enter into retransmission consent agreements, the Commission should *not* go down the path of attempting to engage in detailed monitoring and evaluation of retransmission consent negotiations – a task the courts have deemed impossible in the context of ordinary commercial transactions such as this.

In retransmission consent negotiations, both sides stand to gain from the transaction, and both sides recognize that the other side stands to gain. This is the classic circumstance of a normal business transaction in which "both sides presumably try to get the best of the deal. That is the essence of bargaining and the free market. . . . *[O]ne cannot characterize self-interest as bad faith. No particular demand in negotiations could be termed dishonest, even if it seemed outrageous to the other party.*" *Feldman*, 850 F.2d at 1223 (7th Cir. 1988) (emphasis added).

Attempting to control the back-and-forth of negotiations between stations and MVPDs would put the Commission in an impossible position. As is true in any ordinary bargaining situation, the parties may have differing views about how to quantify the gains that each will enjoy from the transaction, and how to split those gains through the bargaining process. For example, a station may note that an MVPD considers carriage of local stations to be very valuable to its overall business plan -- and is also collecting large amounts of money each month for delivery of those stations. Given those facts, a station may ask for substantial consideration in return for a grant of retransmission consent, on the theory that it is contributing great value to the MVPD. On the other hand, an MVPD may take the position that it does not want to share any of its gains with the station, and that the station should be satisfied simply with the benefits of carriage.

These are routine bargaining maneuvers in the free marketplace and do not in any way reflect a lack of good faith. Nor does a party's decision to size up a particular party with whom it is negotiating reflect anything wrong: indeed, evaluating what type of deal one can make with a particular party is another standard part of the world of everyday marketplace bargaining. To impose a further set of government-directed rules on the bargaining process will only result in increasing transaction costs — a result Congress, in trying to encourage robust competition, could not possibly have desired. *See, e.g.*, *Industrial Representatives, Inc. v. CP Clare Corp.*, 74 F.3d 128, 132 (7th Cir. 1996) ("Parties to contracts are entitled to seek, and retain, personal advantage; striving for that advantage is the source of much economic progress").

A. The Commission Should Impose Only A Limited Set of Process-Oriented Rules

Given the context – that both sides have incentives to make a deal, but may have differing views about how to share the gains – the Commission should *not* attempt to embroil itself in the details of the negotiating process. Instead, the Commission should simply impose a few objective rules simply designed to ensure that the parties in fact communicate with one another about the terms of a possible deal.

The NLRB's experience suggests the following three objective rules, which would not present insuperable problems of interpretation or enforcement:

- **Negotiator must have authority.** Under 5 U.S.C. § 7114(b)(2) and 22 U.S.C. § 4113(e)(2), the duty of good faith bargaining includes an obligation to be represented by authorized representatives.

- **Party must offer to meet at reasonable times and convenient places.** *See* 5 U.S.C. § 7114(b)(3); 22 U.S.C. § 4113(e)(3).

- **Executing a written agreement once all terms have been agreed on.** Under 5 U.S.C. § 7114(b)(5) and 22 U.S.C. § 4113(e)(6), a party must be willing to execute a written contract once agreement has been reached on all points.

B. The Commission Should *Not* Require Information Exchanges As Part of the Bargaining Process

In the radically different context of regulations under Section 251 of the Communications Act and regulations under the Taft-Hartley Act, parties have sometimes been required to exchange certain information as part of a "good faith" negotiating process. *E.g.*, 47 C.F.R. § 51.301(c)(8). In the context of retransmission consent negotiations, such a requirement is not only unnecessary but would almost certainly be abused by MVPDs as a ploy to generate grounds for complaining about a supposed lack of good faith bargaining.

Under our legal system and free market economy, a party has no obligation during a negotiation to respond to "discovery requests" from other parties demanding production of the company's internal information or documents. If the Commission strayed from that rule by imposing a mandatory discovery process on broadcasters, MVPDs could easily "set up" broadcasters for claims of bad faith by making sweeping requests for broad categories of sensitive documents. Nor is there any need for such a mandatory discovery process. *First*, as discussed above, broadcasters have inherent incentives to enter into retransmission consent agreements, and there is no need for intrusive, non-market-based regulation such as coerced discovery. *Second*, the mandatory information exchange imposed by the Commission in the context of Section 251 was based on the fact that local exchange carriers had a *statutory obligation* to provide interconnection services to new entrants – an obligation completely lacking here, since Congress emphatically did *not* impose any obligation on local TV stations to enter into deals involuntarily. *Third*, if any information exchange were appropriate here, it would be in the reverse direction: stations might want to ask for a detailed account of the gains enjoyed by MVPDs from carriage of local stations, such as an accounting of a satellite carrier's profits when it charges $6 per month to carry stations for which it pays only uplink costs and no copyright fees. But while stations might wish to obtain that information, such a discovery process is simply not part of a normal marketplace negotiation under our free market system. By the same token, MVPDs have no right to demand that a station respond to discovery requests about the station's own finances or other matters.

C. Antitrust Law Should Not Be a Part Of the Commission's Good Faith Standard

The Commission should not attempt to apply the antitrust laws to the "good faith" provisions of the SHVIA. The Justice Department, the Federal Trade Commission, and the courts have ample power – and expertise -- to evaluate any claimed violation of the antitrust laws in retransmission consent negotiations. The Commission has no mandate to go beyond its own expertise by attempting to take over the role of these sister agencies in the complex and ever-shifting area of antitrust enforcement.[17]

D. The Commission Should Not Interfere With Other Routine Marketplace Bargaining Methods

Finally, the requirement of good faith negotiating cannot be interpreted to bar commonly accepted marketplace approaches that are based on "competitive marketplace considerations." Such routine bargaining approaches include the following:

1. Insisting that MVPD stop violating the station's rights

It is natural for a company whose rights are being violated to ask that the violations stop before it will enter into a new transaction with the transgressor. If this were not the case, MVPDs could benefit twice from their illegal activity: once by committing the

[17] The comment by a single legislator suggesting that an analysis of "illegal tying and bundling" is required to assess good faith is inconsistent with the statutory text. Moreover, the Conference Report, which (unlike comments by a single legislator) is entitled to "great deference," *see RJR Nabisco, Inc. v. United States*, 955 F.2d 1457, 1463 (11th Cir. 1992), contains no suggestion that the FCC is authorized to use the "good faith" standard as a basis for becoming the third federal antitrust enforcement agency.

violations themselves, and again by using broadcasters' insistence on stopping the violations as evidence of bad faith.

This is not an academic concern: satellite carrier EchoStar is today violating the rights of hundreds of local broadcast stations by illegally delivering distant network signals to thousands of ineligible subscribers in many markets.[18] If a station believes that an MVPD is violating the station's intellectual property rights through unlawful retransmission of copyrighted programming, the station is plainly entitled to insist that a satellite carrier stop its infringements before the station will grant the MVPD additional retransmission rights. Indeed, the case law recognizes that a party, acting in good faith, could go much further, and decline to enter into deals with a party that had engaged in *lawful* business conduct that the party considered inconsistent with the party's own philosophy of doing business. *See Candid Productions*, 530 F. Supp. at 1337 (determining which parties one will contract with is a fundamental part of freedom of contract). Even aside from that broader principle, however, there is no basis for penalizing a station for insisting that an MVPD stop violating its rights before the station enters into new arrangements with the MVPD.[19]

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[18] *See, e.g.*, Record Evidence Demonstrating that Plaintiffs Are Likely to Succeed on the Merits, *CBS Broadcasting Inc. v. EchoStar Communications Corporation*, No. 98-2651-Nesbitt-Johnson (S.D. Fla.) (filed Sept. 28, 1999).

[19] *Cf. EchoStar Communications Corp.*, CSR-5364-P, DA 99-1148, 1999 WL 381800 (F.C.C. June 10, 1999) (even program access rules, which impose significantly greater restrictions on program suppliers, are "[not] designed to force a programming vendor to continue to provide its programming to a distributor during the pendency of a non-frivolous breach of contract action on an underlying programming contract. ")

2. Declining to enter into an agreement unacceptable to a party

As discussed above, even when a duty to negotiate in good faith exists, a party is not under any obligation to enter into a binding agreement if the other side does not offer terms acceptable to the party. The Commission should therefore not in any way suggest that failure to reach a deal is by itself evidence of a lack of good faith. In some cases, parties simply have very different views about the appropriate division of gains from the transaction and therefore reach an impasse. Indeed, if the failure to reach a deal was seen as evidence of bad faith, MVPDs could stake out any position, no matter how extreme, and use a station's refusal to capitulate as evidence of bad faith.

Even under the original House version of the SHVIA, which imposed much stricter antidiscrimination rules, the failure to reach a deal at all was perfectly legitimate. *See* 145 Cong. Rec. H2320 (daily ed. Apr. 27, 1999) ("[T]he failure to reach an agreement with [a] distributor would not constitute a discriminatory act that is intended to be barred . . . ."); *see also Candid Productions*, 530 F. Supp. at 1337 ("A commitment to good faith negotiations does not carry with it a surrender of one's right to decide not to enter into another contract with a party.").

3. Insisting on consideration

When an MVPD is using a station's signal to enhance the MVPD's own product offerings, and is reselling both the station's signal (and its packages as a whole) at high prices, it would be natural for the station to insist on receiving what it deems to be fair consideration for the use of its signal. This is an obvious and routine bargaining approach, just as a wholesaler of Pokemon cards can take into account the fact that retailers are reselling the cards at very high prices. That is true whether or not the station has – at different times and under different competitive circumstances – agreed to license to product without consideration in the past.

4. Taking into account a party's size, pricing policies, and other specific circumstances

When a business bargains with another business in everyday marketplace negotiations, it often looks to what that particular party can offer and to the particular strengths and weaknesses of its bargaining position. For example, a station may be in a weaker bargaining position against an MVPD with 50% of the viewers in a local market than against an MVPD with 1% of the viewers in that market. Similarly, a station might view differently an MVPD that has aggressively touted the high value of retransmitting local stations than an MVPD that contends it can thrive without retransmitting local stations at all. And a station may view MVPDs differently based on how they package, and price, the station's signal when the MVPD resells it to its customers. These are all part of normal "competitive marketplace considerations" that businesses take into account in everyday negotiating strategies, and should in no way be condemned as reflecting any lack of good faith. *See* 145 Cong. Rec. H2320 (daily ed. Apr. 27, 1999) ("As long as a station does not refuse to deal with any particular distributor, a station's insistence on different terms and conditions in retransmission agreements based on marketplace considerations is not intended to be prohibited by this bill.") (statement of Rep. Tauzin).

5. Taking into account the presence of multiple MVPDs seeking retransmission consent

When retransmission consent first became applicable to MVPDs in 1993, there was usually only one game in town: the local cable system. As a result, the cable industry had enormous bargaining power in negotiating retransmission consent with stations. Today, by contrast, there are multiple MVPDs in some markets, a factor that any rational station in those markets would take into account in its negotiating strategy. Short of entering into an exclusive retransmission agreement, which is not permissible, nothing prevents a station from seeking to take advantage of multiple bidders to obtain more favorable terms. Again, taking these changing circumstances into account as part of the negotiating mix is a routine and everyday example of a "competitive marketplace consideration."

6. Offering a combination of elements

In many transactions, two parties will have a variety of different issues to discuss, and a party may offer concessions on one issue in return for an accommodation on one or more other issues. This is a commonplace and efficient practice that is part of many "competitive marketplace" negotiations, and one that has already taken place in the retransmission consent context.[20] There should be no bar on this practice, which might include, for example:

- asking an MVPD to carry a station's digital signal in return for consent to carry its analog signal;
- asking an MVPD to carry the signals of stations in other markets that are under common ownership with the station in question; and

[20] Fox and EchoStar agreed to retransmission consent arrangements as part of a larger deal resolving other differences between the parties. *See* EchoStar Communications Corporation, SEC Form 10-Q (filed Nov. 2, 1999) <http://www.corporate.ir.net/ireye/ ir_site.zhtml?ticker=dish&script=800&layout=4>.

- negotiating over carriage of the signals of two stations owned by the same company in the same market (pursuant to the new duopoly rules).

These negotiating procedures raises no issues about "good faith." First, there is certainly nothing to prohibit a company from negotiating a joint retransmission agreement with respect to all the stations it owns (in a single market or otherwise). Second, with respect to the form of compensation ultimately negotiated between the parties, particularly arrangements to carry two commonly-owned stations in a single market, there is no reason to suggest that any further action by the Commission is necessary: these transactions are subject to the same antitrust and other legal principles applicable to any commercial transaction or joint venture entered into by broadcasters.

7. Taking into account <u>most-favored-nation clauses in existing agreements</u>

In marketplace negotiations, a party may ask (and have the bargaining power to insist) that the other party agree to a "most favored nation" clause, which effectively gives the first party the benefit of any more favorable deal that the second party may make with others in the future. A party that has agreed to give most-favored-nation protection to another party has special constraints on future deals: it knows that if it grants a more favorable deal to a third party, it will thereby automatically be changing (for the worse, from its perspective) the deal it has previously made with the original party. As a result, once a party has entered into a contract with a most-favored-nation clause, it will typically be reluctant to offer better terms to other parties. Again, this is a perfectly ordinary "competitive marketplace consideration" and not one that should be considered in any way to show an absence of good faith.

8. Responding to the conduct of the other party

However one may define "good faith," a station is certainly not required to continue to engage in negotiations with an MVPD that is itself not showing good faith. Absent this basic principle of reciprocity, an MVPD could itself engage in certain bargaining techniques and yet allege that the station was acting in bad faith by responding in kind. For example, if an MVPD proposed to send only an individual without negotiating authority to a meeting, a station would not be required to send an individual who had such authority.

9. Offering the same terms offered to a similarly situated third party

To minimize negotiating costs, a party may decide, even in the absence of a most-favored nation clause, to use an existing agreement as a template in negotiating with other firms that the party views as being similarly situated. Since a prior agreement may reflect a great deal of back-and-forth with a similar firm, a party may conclude that the simplest approach is simply to offer a new party the same terms that it has already negotiated with another party. At the same time, of course, a company may conclude that a prior deal with another party is not a suitable template because circumstances have changed or the parties are differently situated. Either approach is commonplace in ordinary marketplace negotiations and does not reflect any lack of good faith.

VII. Procedural Matters As to "Good Faith" Complaints

The Commission should adopt regulations concerning "good faith" negotiations that minimize what could otherwise be the enormous regulatory burdens on the Commission itself and on the parties to the thousands of retransmission consent negotiations that will take place over the next few years.

A. Summary dismissal procedures

The Commission should create procedural rules that permit it to dismiss retransmission consent complaints summarily if the MVPD fails to satisfy a specified threshold standard. Specifically, the Commission should not commence a costly, time-consuming, and burdensome adjudication unless if the MVPD has pleaded a violation of one of the three objective, process-oriented rules described above. An allegation of "lack of good faith" that does not fall within one of these three objectively determinable categories should be summarily dismissed on motion.

B. Burden of proof

Since stations have inherent marketplace incentives to make deals with MVPDs, and to prevent use of "good faith" complaints as a harassment tactic, the burden of proof should always be on the MVPD claiming a violation. That allocation of the burden is consistent with the rule in labor cases, in which the party claiming bad faith bears the burden of proof. *See North Cambria Fuel Co. v. NLRB*, 645 F.2d 177, 182 (3d Cir. 1981) ("It is settled that the burden of proving a violation of the National Labor Relations Act is on the General Counsel."); *NLRB v. St. Louis Cordage Mills*, 424 F.2d 976, 979 (8th Cir. 1970) ("The principle is firmly established that the burden is upon the General Counsel to prove the essential elements of the charged unfair labor practices" -- in that case an alleged failure to negotiate in good faith).

C. **Remedy**

Under settled principles, the remedy for an alleged failure to bargain in good faith is simply a directive to engage in further bargaining. In the NLRB context, for example, the Supreme Court long ago determined that the Board had no power to order parties to enter into an particular agreement (or even agree to any individual terms). *See H. K. Porter Co.*, 397 U.S. 99, 108 (1970) ("[A]llowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based -- private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.").[21]

The principle that parties cannot be ordered to enter into any particular agreement remains in full force today. *See Capital Cleaning Contractors, Inc. v. NLRB*, 147 F.3d 999, 1011 (D.C. Cir. 1998) (Board lacks "'power to compel a company . . . to agree to any substantive contractual provision'") (quoting *H.K. Porter Co.*); *Taylor Warehouse Corp. v. NLRB*, 98 F.3d 892, 903 (6th Cir. 1996) (Board may not judge substantive terms of agreement) (citing *H.K. Porter Co.*).

The fact that the Commission lacks the power to order parties to enter into any particular agreement is confirmed by the language of the Act here, which -- like the "good faith" provisions administered by the NLRB -- simply directs stations to "negotiate in good faith," not to enter into any particular deal. In other words, if a station refuses to negotiate at all with a

[21] *See also NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 404 (1952) ("[I]t is equally clear that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements.").

particular MVPD, that refusal can be remedied by directing the station to negotiate. But the Commission cannot force a particular *result* of negotiations, and there is nothing in the SHVIA -- or in fundamental principles of contract law -- that would make it appropriate for the Commission to do so.

D. Timing

Congress made a carefully considered decision to expedite enforcement procedures brought by stations against satellite carriers that retransmit the station's signals without their consent. *See* 47 U.S.C. § 325(e). As the Conference Report explains, Congress created these explicit, streamlined procedures "to ensure that retransmission consent will be respected by all parties." 145 Cong. Rec. at H11796 (daily ed. Nov. 9, 1999). The same Congress decided *not* to order expedited treatment for claims about alleged violations of the "good faith" obligation on TV stations. Congress's decision to order expedited treatment in one case, but not to do so in the other, is obviously highly significant.

Equally significant is Congress' decision not to allow alleged good faith violations to be raised as a defense in retransmission consent enforcement proceedings, *see* 47 U.S.C. § 325(e)(4). If Congress intended the "good faith" issue to be resolved on a particularly fast track, it would simply have folded that issue into the expedited proceedings under Section 325(e) for enforcement of retransmission consent violations.

In any event, the technique that Congress has used to enable expedition of proceedings about violations of retransmission consent is to minimize discovery and to provide for rulings without live witnesses in most cases. If the Commission wishes to ensure that complaints about alleged "good faith" violations are resolved quickly and efficiently, it should (a) limit its inquiry to compliance with a handful of objective, process-oriented rules and (b) dismiss on motion any complaint that is not based on alleged violations of those objective rules. The goal of prompt resolution is completely inconsistent with having full-blown adjudications about "all the facts and circumstances" of each individual retransmission consent negotiation.[22]

VIII. The Prohibition on Exclusive Retransmission Agreements

As the NPRM explains, the Commission has for several years had in place a regulation barring "exclusive retransmission consent arrangements." 47 C.F.R. § 76.64(m). That regulation bars a TV station from "mak[ing] an agreement with one multichannel distributor for carriage, to the exclusion of other multichannel distributors."

The SHVIA effectively ratifies these existing regulations, while imposing a January 1, 2006 sunset on them. Thus, although the Commission would otherwise have had the freedom to revisit (before 2006) whether its prohibition on exclusive retransmission consent agreements was appropriate, Congress has now decided that the Commission should retain this regulation until that date, but no longer. Although the Act uses the phrase "engaging in" rather than the phrase "entering into" (as in the Commission's existing regulation), we respectfully suggest that this is a mere difference in style without any substantive content.

As to pleading and proof: to make out a case for violation of the prohibition on exclusive retransmission consent agreements, an MVPD should be required to plead and prove that (1) the

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[22] Similarly, the Commission lacks the authority to, and should *not*, open up for possible adjudication any retransmission consent deals that were entered before the effective date of its regulations.

station has agreed to be carried by only "one multichannel distributor," and (2) the station's contract with that single distributor expressly bars the station from entering into retransmission consent agreements with other MVPDs.

Conclusion

Because TV stations and MVPDs have strong inherent business incentives to negotiate over retransmission consent, the Commission does not need to, and should not, attempt to impose a complex regulatory regime on the routine bargaining that will take place between them. Rather, the Commission should promulgate a few simple, objective rules designed to ensure that stations in fact communicate with MVPDs about possible agreements. Any more intrusive regulatory regime would only ensnare the Commission in needlessly complex and burdensome adjudications and increase the transaction costs of the marketplace negotiations between stations and MVPDs.

Respectfully submitted,

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